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95-1705

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Petitioner,

v.

JOHN D. ROTH, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT

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April 18, 1996

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QUESTIONS PRESENTED

1. Whether a state court, hearing an action brought under the FELA and involving comparative negligence issues for a jury, may compel FELA litigants to utilize a form of verdict that is materially different from the form of verdict utilized in all other similarly situated comparative negligence actions in the state?

2. Whether a state court, hearing an action brought under the FELA and involving comparative negligence issues for a jury, may compel FELA litigants to utilize a form of verdict that precludes meaningful appellate review of the jury verdict?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner The Atchison, Topeka and Santa Fe Railway Company and respondent John D. Roth, Jr.

The parent/holding company of petitioner The Atchison, Topeka and Santa Fe Railway Company is Santa Fe Pacific Corporation. The parent/holding company of Santa Fe Pacific Corporation is Burlington Northern Santa Fe Corporation. Burlington Northern Santa Fe Corporation's other subsidiaries are Burlington Northern Inc. and Burlington Northern Railroad Company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Petitioner*,

v.

JOHN D. ROTH, JR., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT

Petitioner The Atchison, Topeka and Santa Fe Railway Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals for the Western District, entered in the above proceeding on October 24, 1995.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals for the Western District is reported at 912 S.W.2d 583, and is reprinted in the appendix hereto, p. A1, *infra*.

The opinion of the Missouri Supreme Court denying the application for transfer is unreported. It is reprinted in the appendix hereto, p. B1, *infra*.

JURISDICTION

The judgment of the Missouri Court of Appeals for the Western District was entered on October 24, 1995, affirming respondent's judgment entered following two FELA jury verdicts. The Missouri Court of Appeals for the Western District denied a timely motion for rehearing and/or application for transfer on December 5, 1995. Thereafter, on January 23, 1996, the Missouri

Supreme Court denied a timely direct application for transfer. The jurisdiction of this Court is invoked under 28 U.S.C §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. art. IV, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45 U.S.C. § 53

The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

STATEMENT OF THE CASE

Petitioner is a railroad engaged in interstate commerce. In 1992, petitioner was sued in the state court of Missouri by one of its employees, respondent herein, for two separate personal injuries allegedly sustained during the course and scope of respondent's employment with the railroad. The action was brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* ("FELA"). A Missouri jury ultimately awarded respondent general verdicts for $400,000.00 and $360,000.00, respectively, for his two alleged on-the-job injuries.

During the combined trial, at the instruction conference with the trial court, petitioner objected to the use of the Missouri Approved Instructions for FELA actions, to wit: MAI 8.02 and MAI 36.01, reprinted in the appendix hereto, pp. C1, D1, *infra*. Under those instructions, the jury is not permitted to record on the final verdict form its findings of percentages of fault or its findings of total damages. Instead, under MAI 8.02 and MAI 36.01, the jury is permitted only to record a single "net" damages figure.

In place of MAI 8.02 and MAI 36.01, petitioner requested the trial court to give the Missouri Approved Instructions used in all other comparative fault cases tried in the state of Missouri, to wit: MAI 37.03 and MAI 37.07 reprinted in the appendix hereto, pp. E1, F1, *infra*. Those instructions would have required the jury to record both its findings of percentages of fault and its findings of total damages. The trial court refused petitioner's request to use MAI

37.03 and MAI 37.07. As a result, on this appeal, it is impossible to determine the total damages found by the jury (and thus assess any possible excessiveness) or the percentages of fault found by the jury (and thus assess whether those findings are contrary to the law and facts).

REASONS FOR GRANTING THE WRIT

I.

The Missouri courts' requirement that FELA litigants utilize a form of verdict materially different from the form of verdict utilized in all other similarly situated comparative negligence actions violates the supremacy, equal protection and due process clauses of the United States Constitution and conflicts with the decisions of this Court.

This Court has succinctly and simply summarized the obligation of state courts entertaining FELA cases:

> Nor may a State discriminate disadvantageously against actions for negligence under the [Federal Employers' Liability Act] as compared with local causes of action in negligence. . . . [A state satisfies its duty not to discriminate disadvantageously against FELA actions only when] all negligence suits in a State are treated in the same way, by the same mode of disposing equitable, non-jury, and common law jury issues . . . .

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 365, 367-68 (1952) (*Frankfurter, J., concurring, in part, and dissenting, in part*) (*citing* Missouri *ex rel.* Southern Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950); McKnett v. St. Louis & San Francisco R.R. Co., 292 U.S. 230, 234 (1934)) (*emphasis added*). The Missouri Approved Instructions ("MAI") for FELA cases violates this most basic and fundamental constitutional precept of similar and equitable treatment.

The two injuries involved in this case were submitted to the jury by the trial court under theories of comparative fault. At trial, petitioner proffered and the trial court refused instructions that

would have adhered to the format required by MAI for instructing a jury in a "typical" comparative fault negligence case, *i.e.*, a case involving every defendant in Missouri other than an FELA railroad-defendant. Instead, the trial court gave, over petitioner's timely constitutional objection, the present MAI instructions for FELA actions which differ fundamentally from the typical Missouri comparative fault jury instruction package. The divergence between the two schemes may be easily summarized. The MAI comparative fault instructions for all "non-FELA" cases have the jury make two critical determinations -- the parties' respective percentages of fault and the plaintiff's total damages. Both of these jury findings of fact must be explicitly recorded on the verdict form. MAI 37.07. The jury is further informed in the required damages instruction under the "non-FELA" comparative fault format:

> In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

MAI 37.03. Essentially, then, in "non-FELA" comparative fault cases in Missouri, the jury considers the evidence and makes findings of fact, *i.e.*, respective percentages of fault and total damages. The trial court thereafter performs the legal and ministerial act of making the computation of reducing total damages by the percentage of fault assessed to a plaintiff.

The MAI scheme for instructing in FELA cases is radically different. Missouri juries are told in the required FELA damages instruction:

> If you find plaintiff contributorily negligent as submitted in Instruction No. _, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [Notes on use]. Correspondingly, the required verdict form for FELA cases, MAI 36.01, allows for a recording only of a "net damages" amount and does not permit the jury to record either percentages of fault or total damages.[1]

Missouri state courts have a well-established duty under the United States Constitution to treat FELA cases "the same way" they treat other similarly situated negligence actions. By refusing petitioner's tendered instructions -- the form of instructions and verdicts used by Missouri courts in all other negligence actions involving comparative fault -- the trial court committed a constitutional error for which the only remedy is a new trial.

During the early 1900's, in response to state court resistance to hearing FELA cases, this Court handed down a series of decisions that held state courts must treat FELA negligence actions the same way other negligence suits arising under state law are handled. To that end, the Court struck down a variety of other state schemes which discriminated against FELA actions. *See, e.g.*, Mondou v. New York & New Haven R.R. Co., 223 U.S. 1, 57-59 (1911); *see also* New York v. U. S., 505 U.S. 144, 148 (1992).

Based upon Mondou and its progeny, Justice Frankfurter summarized the duty of state courts in FELA actions:

> Nor may a State discriminate disadvantageously against actions for negligence under the [Federal Employers' Liability Act] as compared with local causes of action in negligence.

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 365 (1952) (*Frankfurter, J., concurring, in part, and dissenting, in part*) (*citing* Missouri *ex rel.* Southern Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950); McKnett v. St. Louis & San Francisco R.R. Co., 292 U.S.

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[1] Demonstrating the absurdity of the present MAI scheme for instructing juries in FELA cases is the fact that the form of verdict required for FELA comparative fault cases is used in other Missouri cases only when there is no submission of comparative fault.

230, 234 (1934)). Specifically, a state satisfies its duty not to discriminate disadvantageously against FELA actions only when "all negligence suits in a State are treated in the same way, by the same mode of disposing equitable, non-jury, and common law jury issues . . . ." Id. at 367-68 (*emphasis added*).

Under the straightforward directions of this Court, state courts are constitutionally obligated to treat FELA negligence cases the same way other negligence cases are handled with regard to "disposing [of] common law jury issues." Here, petitioner and the claims of respondent were not treated the same as other similarly situated negligence claims being prosecuted in the state courts of Missouri. Missouri courts improperly discriminate against FELA actions by requiring use of MAI 8.02 and MAI 36.01 and thereby violate the holding in Kansas City Southern Ry. Co. v. Jones, 241 U.S. 181 (1916), that a railroad in an FELA action "has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee." Id. at 183 (*emphasis added*).

II.

The Missouri courts' requirement that FELA litigants utilize a form of verdict that precludes meaningful appellate review of the jury verdict violates the supremacy, equal protection and due process clauses of the United States Constitution and conflicts with the decisions of this Court.

As a result of the disparate treatment afforded FELA action by the Missouri Approved Instructions, the total amount of plaintiff's damages and relative apportionment of fault of the respective parties are never listed on the verdict form. Apart from being hopelessly vague and confusing to lay jurors, these MAI instructions and procedure violate federal substantive and constitutional law. As a result of MAI's disparate treatment of FELA cases, it is literally impossible for the parties or a reviewing court to determine from the final jury verdict:

a) the gross amount of damages found by the jury,

b) the jury's relative apportionment of fault between the plaintiff and the railroad, and

c) whether the procedure for FELA fault calculation, mandated by federal substantive law, was followed, or even whether a mathematical mistake was made by the jury.

The differences between the two Missouri schemes for instructing juries improperly discriminate against FELA cases and deprive petitioner of meaningful appellate review in violation of decisions of this Court as well as in violation of the equal protection, due process and supremacy clauses of the United States Constitution and Missouri Constitution. U.S. CONST. art. IV, cl. 2; U.S. CONST. amend. V, XIV; MO. CONST. art. I, § 2; MO. CONST. art. I, § 10. For example, in this case, it is impossible to determine whether the jury's "net" recorded verdict of $760,000 was the result of (a) finding respondent 0% at fault, with gross damages of

$760,000.00, or (b) finding respondent 99% at fault, with legally excessive gross damages of $76,000,000.00. Meaningful judicial review, thus, is effectively thwarted and petitioner is denied due process under the law. *See, e.g.*, Honda Motor Co., Ltd. v. Oberg, --- U.S. ---, 114 S.Ct. 2331, 2338-40 (1994); Pacific Mutual Ins. Co. v. Haslip, 499 U.S. 1, 20, 111 S.Ct. 1032, 1044 (1991) (both finding that due process requires that jury damage awards be subject to meaningful appellate scrutiny).

Amazingly, the disparate treatment afforded FELA actions is deliberate. The MAI Committee's reasoning in support of its discrimination against FELA actions, however, is flatly erroneous. The Committee Comments to MAI 8.02 state that 45 U.S.C. §53 requires the jury and not the judge to diminish damages. MAI 8.02 [COMMITTEE COMMENT (1991 REVISION)]. The cited statute, however, includes no such requirement, but merely provides:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

45 U.S.C. §53.

Further demonstrating the flaw of the MAI Committee's reasoning is that no other jurisdiction uses a "net damages" approach, but instead all other federal and state jurisdictions utilize the "total damages/percentages of fault" approach that the MAI Committee asserts is improper. *See, e.g.*, PATTERN JURY INSTRUCTIONS [CIVIL] FOR THE EIGHTH CIRCUIT §7.08 (1995); PATTERN JURY INSTRUCTIONS [CIVIL] FOR THE FIFTH CIRCUIT §5.1 (1995); St. Louis Southwestern Ry. Co. v. Grider, 321 Ark. 84, 87, 900 S.W.2d 530, 532 (1995); Missouri Pacific R.R. Co. v. Brown, 862 S.W.2d 636, 637 (Tex. App. [Tyler] 1993); Topping v. CSX Transportation, Inc., 1 F.3d 260, 261 (4th Cir. 1993); Sinclair v. Long Island R.R., 985 F.2d 74, 76 (2d Cir. 1993); Janke v. Duluth & Northwestern R.R. Co., 489 N.W.2d 545, 546 (Minn. App. 1992); PATTERN JURY

INSTRUCTIONS [CIVIL] FOR THE ELEVENTH CIRCUIT §6.1 (1990); Wilson v. Burlington Northern R.R. Co., 804 F.2d 607, 609 (10th Cir. 1986); Merando v. The Atchison, Topeka and Santa Fe Ry. Co., 232 Kan. 404, 406-07, 656 P.2d 154, 157 (1982).

The appellate courts below gave short thrift to petitioner's constitutional objections, merely noting:

> At the outset, we acknowledge strict adherence to MAI forms and "Notes on Use" is required by our Supreme court and recall its admonition that `[i]f this court is to make this system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that pattern the pattern instructions be used as written.'

Roth v. Atchison, Topeka and Santa Fe Ry. Co., 912 S.W.2d 583, 591 (Mo. App. [W.D.] 1995) (*citation omitted*). Simply because the questioned instructions are "approved" instructions, however, does not remedy or erase the constitutional taint.[2] In another FELA case, this Court previously was confronted with a similar reliance on MAI and has rejected such blind reliance when federal substantive rights

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[2] Under the applicable state law, petitioner preserved its constitutional attack on the Missouri Approved Instructions by timely offering alternative instructions and by raising its constitutional objections orally at the instruction conference and in writing at the earliest opportunity "consistent with good pleading and orderly procedure [*i.e.*, the new trial motion]." City of Chesterfield v. Director of Revenue, 811 S.W.2d 375, 378 (Mo. 1991) (*en banc*). The Missouri Supreme Court has noted:

> Before the [objected to] instructions were given to the jury, counsel objected. . . . A similar complaint was included in the motion for new trial that the instructions [were unconstitutional]. This was sufficient to inform the plaintiff and trial court of the basic flaws in the instructions and to preserve the issue on appeal.

Bennett v. Owens-Corning Fiberglas Corp., 895 S.W.2d 464, 467 (Mo. 1995) (*en banc*).

are involved. St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985). As in Dickerson, the constitutional error committed by the trial court and the constitutional injury suffered as a result by petitioner cannot and should not be justified or condoned by hiding behind the shield of "approved" instructions.

CONCLUSION

In the underlying trial, the trial court specifically found that the comparative fault on the part of plaintiff was submissible to the jury. Nonetheless, the trial court refused petitioner's proposed jury instructions and verdict form that would have adhered to the MAI approach required in a typical "non-FELA" comparative fault case. Instead, the trial court -- over petitioner's timely constitutional objections -- gave MAI's "net damages" instruction and verdict form. As a result, both petitioner and the reviewing courts are deprived of any opportunity to examine in any meaningful way the jury's findings of total damages or percentages of fault with respect to the final $760,000.00 verdict.

The instructional scheme required by MAI discriminates disadvantageously against FELA actions as compared to similar negligence actions in Missouri. This discriminatory treatment is the result of a fallacious conclusion of the MAI Committee, a conclusion not followed in any other state or federal jurisdiction. Moreover, this discrimination of FELA actions violates the core principles of the United States and Missouri constitutions, ignores numerous holdings of this Court and tramples upon the most basic precepts of fairness, equal treatment and federalism of American jurisprudence. This Court must issue its writ of certiorari and correct this constitutional wrong.

Respectfully submitted,

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April 18, 1996

APPENDIX

John D. ROTH, Jr., Respondent,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

No. WD 50194

Missouri-Court of Appeals, Western District.

Oct. 24, 1995

Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 5, 1995.

Application to Transfer Denied Jan. 23, 1996.

Railroad employee, who injured back while manually removing crossing planks, sued railroad under Federal Employers' Liability Act (FELA). The Circuit Court, Jackson County, Weldon C. Judah, Special Judge, denied railroad's motion for judgment not withstanding the verdicts. Railroad appealed. The Court of Appeals, Ellis, J., held that: (1) evidence that railroad was negligent was sufficient for submission to jury, and (2) medical evidence causally connecting employee's back injury to manually lifting crossing planks was sufficient for submission to jury.

Affirmed.

1. Employers' Liability -- 171

Actions brought under Federal Employers' Liability Act (FELA) are governed by federal law. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Employers' Liability -- 171

Question of whether railroad employee adduced sufficient evidence to make submissible case for jury in Federal Employers' Liability Act (FELA) case was governed by federal law. Federal Employers' Liability Act, §, 1 et seq., 45 U.S.C.A. § 51 et seq

3. Employers' Liability -- 214

Test for whether employee adduces sufficient evidence to make submissible case for jury in Federal Employers' Liability Act (FELA) action is whether proofs justify, with reason, conclusion that employer negligence played any part, even the slightest, in producing injury or death for which damages are sought; it does not matter that, from the evidence, jury many also, with reason, on grounds of probability, attribute result to other causes. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Employer' Liability -- 214

Judicial appraisal of proofs to determine whether jury question is presented in Federal Employers' Liability Act (FELA) action is narrowly limited to single inquiry whether, with reason, conclusion may be drawn that negligence played any part at all in injury or death; if that test is met, judges are bound to find that case for jury is made out whether or not evidence allows jury choice of other probabilities. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Appeal and Error -- 934(1)

Where employer asserted error in denial of its motion for judgment notwithstanding verdicts in Federal Employers' Liability Act (FELA) case presenting issue of whether employee made submissible case, Court of Appeals would review evidence in light most favorable to employee and accord him all reasonable beneficial inferences that could be drawn from it. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Judgment -- 199(3.5)

Motion for judgment notwithstanding the verdict can only be sustained if reasonable minds could not differ.

7. Employers' Liability -- 223.1

Only slight or minimal evidence is necessary to create jury question on issue of employer's negligence in Federal Employers' Liability Act (FELA) action. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Appeal and Error -- 863

Unless there is complete absence of probative facts to support jury's findings that employer was negligent in Federal Employers' Liability Act (FELA) action, Court of Appeals cannot say trial court erred in denying motion for judgment notwithstanding the verdict. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

9. Employers' Liability -- 223.1

Evidence that railroad was negligent was sufficient for submission to jury, in employee's action under Federal Employers' Liability Act (FELA) based on back injury; jury could reasonably find that, when railroad required employee to manually remove crossing planks rather than using available mechanical lifting equipment, it failed to provide reasonable safe conditions for work, to provide reasonably safe appliances, to provide reasonably safe methods of work, and to provide reasonably adequate help. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

10. Employers' Liability -- 30

Employer's duty to provide reasonably safe conditions for work under Federal Employers' Liability Act (FELA) contemplates that employer will take precautions commensurate with dangers to be encountered in the circumstances, with question of reasonableness depending upon danger attending place or machinery. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

11. Employers' Liability - 30

Employer's duty under Federal Employers' Liability Act (FELA) to provide reasonably safe conditions for work requires employer to eliminate those dangers that could be removed by exercise of reasonable care. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

12. Employers' Liability -- 31.1

Employer's duty under Federal Employers' Liability Act (FELA) to provide reasonably safe appliances extends to providing proper tools for employees to work safely, not just tools free from defects. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. §

51 et seq.

13. Employers' Liability -- 224

Question of alternative methods available for doing work are facts to be considered by jury in determining whether method used by employer was reasonably safe, and whether other methods could have been easily adopted, for purposes of determining whether employer provided reasonably safe methods of work as required by Federal Employers' Liability Act (FELA). Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

14. Employers' Liability -- 217.1

Medical evidence causally connecting employee's back injury to his manually lifting crossing planks was sufficient for submission to jury, in employee's action under Federal Employers' Liability Act (FELA); orthopedic surgeon testified to reasonable degree of medical certainty that lifting of planks was consistent with employee's herniated disk. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

15. Employers' Liability -- 206.1

Employee's burden of establishing causal connection between employer's injury is met in Federal Employers' Liability Act (FELA) action when there is evidence, even though entirely circumstantial, from which jury may with reason make inference that employer's negligence contributed in any way to employee's injury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

16. Employers' Liability -- 16

Causation in Federal Employers' Liability Act (FELA) case differs significantly from "normal" negligence case; under FELA, if employer's negligence is the slightest cause of employee's injury, liability is established. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

17. Employer's Liability -- 214

In Federal Employers' Liability Act (FELA) suit, fact questions, to maximum extent proper, shall be left to jury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

18. Trial -- 228(1)

If Missouri Approved Instruction (MAI) is applicable, such instruction must be given to exclusion of all others.

19. Courts -- 91(1)

Court of Appeals is bound to follow Supreme Court's directions requiring strict adherence to Missouri Approved Instruction (MAI) instruction forms and "Notes on Use."

R. B. Miller and Jeffrey P. Ray, Lathrop & Norquish, Kansas City for appellant.

David L. Blunt and John H. Leskera, Blunt & Schum, Edwardsville, IL, for respondent.

Before BERREY, P.J., and ULRICH and ELLIS, JJ.

ELLIS, Judge.

This is an action for personal injuries pursuant to the Federal Employers' Liability Act ("FELA").[1] The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") appeals the trial court's denial of its motion for judgment notwithstanding the verdicts and entering judgment in favor of John D. Roth, ("Roth"). We affirm.

Roth worked for Santa Fe as a trackman. He built and maintained track along the Santa Fe rail lines; this was heavy work requiring considerable lifting. On May 2, 1990, Roth was working under the supervision of Leroy Rosebraugh, a track foreman for Santa Fe. A work crew consisting of Roth and two other men was assigned the task of replacing wooden planks in grade crossings near Augusta, Kansas. At this time in 1990, Santa Fe utilized two methods for removing the old planks in preparation for new, replacement crossing planks. The planks were either lifted and removed manually, using a

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1. 45 U.S.C.A. § 51 (1986).

set of tie tongs and a lining bar or by machine, consisting of a boom on a truck that operated like a crane. On May 2, 1990, although the truck boom was available, the work crew was instructed to manually remove the crossing planks. Roth did not request to use the truck boom to remove the planks because he was worried about being charged with insubordination by Foreman Rosebraugh. Rosebraugh expected the laborers to carry out his orders as directed or else they were considered insubordinate and could be cited for violating Santa Fe rules; insubordination could result in discharge from Santa Fe's employment. However, Roth did ask a co-worker, Mr. William Phillips, why the crew was removing the planks by had rather than by machine. He was told on Foreman Rosebraugh's crew, "that's the way its [sic] done."

A railroad crossing plank weights approximately 360 pounds. removing a plank by had requires the person using the tie tongs to bend over in an awkward, uncomfortable position, grasp the end of the plank with the tie tongs, and lift it high enough to insert a lining bar under the plank. The plank is then lowered onto the lining bar and "rolled" out from under the train rails. In comparison, when removing planks with the truck boom, a chain is wrapped around the plank and the plank is lifted by the boom, rather than by a worker. On May 2, 1990, Roth was using the tie tongs to lift a crossing plank when he felt "extreme pressure" in his lower back. He handed the tongs to a co-worker and tried to "walk off" the discomfort. Despite the urging of a co-worker, Roth did not report the incident or injury to Foreman Rosebraugh. Roth completed his work week by working the following two days and was then off for the weekend. Roth returned to work Monday, May 7, 1990 and began his new work week.

On May 8, 1990, Roth was again assigned to work on grade crossings near Augusta, Kansas. His supervisor was Foreman Louis Fox. That morning, Roth and the two other members of the work crew were instructed to remove crossing planks by hand. One of Roth's co-workers asked Foreman Fox to us the boom truck but was informed it was not working. However, the record reveals that the boom truck was available and working. Nevertheless, Foreman Fox directed that the planks be removed by hand using the tie tongs and lining bar. Roth testified his back was still sore from the May 2, 1990

incident, but he was able to complete the task even though his pain grew worse as he worked. Later in the day, the crew was "gauging track" which required Roth to drive spikes with a spike maul.[2] Roth had driven several spikes and was driving another when he heard his back pop; his pain suddenly increased. He was unable to straighten his back into an upright position without the help of his two co-workers. Roth immediately reported this incident and injury to Foreman Fox. However, he declined an offer to see a doctor. Roth worked two more days before he was layed off (for reasons unrelated to his reported injury).

After he was layed off, Roth's back condition became progressively worse with pain radiating from the lower back to his left leg. He began taking prescriptions and receiving physical therapy treatment from his family doctor, Dr. Steven Thompson. In July, 1990, he was referred to an orthopedic surgeon, Dr. Richard Wendt. Dr. Wendt diagnosed a ruptured or herniated lumbar disc and continued the conservative treatment, hoping to avoid surgery. In August 1990, Roth was sent by Santa Fe for a second opinion. He was sent to Dr. Theodore Sandow, another orthopedic surgeon. After examination, Dr. Sandow concluded surgery would help alleviate Roth's symptoms. Therefore, by October 1990, when the conservative treatment proved unsuccessful, Dr. Wendt surgically removed the herniated L4-5 disc. After surgery, Roth slowly improved. He was eventually released for light-duty work in January 1992. However, to prevent a recurrence of Roth's back problems, Dr. Wendt prohibited work requiring repetitive bending, stooping, and lifting in excess of twenty pounds. Also, to prevent pain, Roth should avoid long periods of sitting by taking breaks every 30 minutes to change his position. Dr. Wendt anticipated these work restrictions would be permanent. Near the time of trial, Santa Fe employed an independent medical examiner, Dr. Ernest Neighbor, who examined Roth. After the examination, Dr. Neighbor agreed that Roth's work restrictions were appropriate for his injury and were permanent in nature.

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2. When "gauging track," one rail is spiked down to the railroad ties, a gauge is placed on both rails to identify the location of the spikes for the other rail, and that rail is secured by spikes driven into the ties.

On December 28, 1992, Roth filed his petition alleging Santa Fe's negligence caused his injuries. Roth's petition asserted two counts of negligence; one count addressed the incident of heavy lifting on May 2, 1990 and the other count addressed the incident of heavy lifting on May 8, 1990. A jury trial was held, and the jury awarded Roth damages of $400,000 for the May 2, 1990 incident, and $360,000 for the May 9, 1990 incident. Santa Fe timely moved for judgment notwithstanding the verdicts (j.n.o.v.), and in the alternative a new trial or remittitur. Santa Fe's post-trail motions were denied without opinion. Santa Fe now appeals, raising three points of error. Santa Fe contends the trail court erred in 1) not granting its motion for j.n.o.v. because Roth failed to adduce sufficient evidence to establish Santa Fe was negligent on either May 2, 1990 or May 8, 1990; 2) giving Roth's verdict directors because the instructions were not fully supported by the evidence; and 3) giving Roth's jury instructions because such instructions violated the due process, equal protection, and supremacy clauses of the United States Constitution and Missouri Constitution because they did not allow the jury to record findings as to percentages of fault between the parties as in all other Missouri comparative fault cases.

> [1-8] Roth brought suit against Santa Fe pursuant to the FELA, 45 U.S.C.A. § 51, which provides in pertinent part: Every common carrier by railroad while engaging in commerce between any of the several States or Territories ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works ... or other equipment.

For its first point, Santa Fe contends the trial court erred in not granting its motion for j.n.o.v. because Roth failed to adduce sufficient evidence to establish Santa Fe was negligent on either May 2, 1990 or May 8, 1990. At the outset, it is imperative we set forth the standards by which we review this jury-tried FELA case. Actions brought un-

der the FELA are governed by federal law. *Stewart v. Alton & S. Ry.*, 849 SW.2d 119 (Mo.App.1993). This includes the question presented by Santa Fe whether Roth adduced sufficient evidence to make a submissible case for the jury. *Hertzler v. Burlington N. R.R.*, 720 S.W.2d 762 (Mo.App.1986). The test in an FELA case is:

> [W]hether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes ... Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may
> be drawn that negligence played any part at all in the injury or death.... [I]f that test is met, [judges] are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.

Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506-07, 77 S.Ct. 443, 448-9, 1 L.Ed.2d 493 (1957). As Santa Fe asserts error in denial of its motion for judgment notwithstanding the verdicts, which presents the issue whether Roth made a submissible case, "we review the evidence in the light most favorable to [Roth] and accord him all reasonable beneficial inferences which can be drawn from it." *White v. Union Pac. R.R.*, 871 S.W.2d 50, 52 (Mo.App.1993). A motion for judgment notwithstanding the verdict can only be sustained if reasonable minds could not differ. *Id.* In addition, we are reminded that only "slight or minimal" evidence is necessary to create a jury question on the issue of Santa Fe's negligence. *Zibung v. Union Pac. R.R.*, 776 S.W.2d 4,5 (Mo. banc 1989). Therefor, unless there is a complete absence of probative facts to support the jury's findings that Santa Fe was negligent, we cannot say the trial court erred. Stewart, S.W.2d at 124.

[9] For its first subpoint, Santa Fe contends Roth failed to adduce legally sufficient evidence to submit a case of FELA negligence for the events on May 2, 1990 or May 8, 1990. Specifically, Santa Fe asserts evidence that using a truck boom was easier and safer than manually removing crossing planks was inadequate to support a jury submission on negligence. Further, Santa Fe alleges Roth

adduced no evidence that his work on May 8, 1990 was in any respect "not reasonably safe" as required under FELA. In our discussion of whether Roth made a submissible case of negligence, we will collectively examine the evidence supporting the May 2, 1990 incident and May 8, 1990 incident. With regard to both incidents, the trial court instructed the jury to determine whether Santa Fe was negligent in any one or more of the following respects: that Santa Fe failed to provide either (a) reasonably safe conditions for work, (b) reasonably safe appliances, or (c) reasonably safe methods of work. In addition, for the May 8, 1990 incident only, the jury was instructed to determine whether Santa Fe was negligent for failing to provide reasonably adequate help (ground (d)).

[10, 11] With respect to ground (a), Santa Fe's duty to provide reasonably safe conditions for work contemplates that Santa Fe will take "precautions commensurate with the dangers to be encountered in the circumstances" with the question of reasonableness depending "upon the danger attending the place or the machinery." *Qualls v. St. Louis S.W. Ry.*, 799 S.W.2d 84, 86 (Mo. banc 1990) (citations omitted). Furthermore, the duty to provide reasonably safe conditions for work requires Santa Fe "to eliminate those dangers that could be removed by the exercise of reasonable care. . . ." *Id.* From our review of the record, we find evidence from which the jury could reasonably conclude Santa Fe failed to provide reasonably safe work conditions for Roth. Roth was employed as a trackman; a job requiring repeated bending, stooping, and heavy lifting. Santa Fe's claim agent, Phil Brady, testified common sense indicates extremely heavy lifting can injure a person's back. Brady further testified such injuries could be prevented by using a truck boom. And yet, testimony from various sources revealed that Roth and his co-workers on both May 2, 1990 and May 8, 1990 were required to engage in replacing extremely heavy crossing planks by *manually* lifting and moving them even though some form of mechanical lifting device was available (such as a truck boom, swing boom, and/or backhoe). Roth testified that in order to manually lift and hold up the crossing planks, he had to stand in an awkward, uncomfortable position. Furthermore, as several witnesses agreed, it is considerably easier and safer to remove crossing planks with a truck boom. From this evidence and all reasonable inferences drawn therefrom, the jury was entitled to believe

Santa Fe knowingly allowed and/or placed Roth at risk of back injury by requiring him to remove crossing planks by hand rather than utilizing the available mechanical lifting equipment which could have eliminated Roth's dangerous work conditions. See Zibung, 776 S.W.2d at 5. The jury could reasonably find Santa Fe failed to provide Roth a reasonably safe workplace.

[12] As to ground (b), Santa Fe misses its mark when it argues there was nothing defective about Roth's work tools. Santa Fe's duty to provide reasonably safe appliances extends to providing the *proper* tools for employees to work safely, no just tools free from defects. The issue is not whether the tie tongs, lining bar, and other hand tools Roth used were in good condition and "safe" for use. The issue is whether providing Roth and his co-workers with tie tongs and a lining bar to remove extremely heavy crossing planks was the proper assortment of tools to safely perform the assigned task. *See generally Hertzler v. Burlington N. R.R.*, 720 S.W.2d 762 (Mo.App.1986) (railroad company's failure to provide the *proper* headlamp was basis for negligence claim and supported injured employee's recovery under FELA). As note, *supra*, Santa Fe's claim agent acknowledged that repetitive heavy lifting can cause back injuries. Furthermore, he admitted employee back injuries could be avoided by using a truck boom to lift and more crossing planks. The evidence show mechanical devices were available on May 2, 1990 and May 8, 1990 to assist Roth in removing the crossing planks; neither day presented a situation where it was necessary for the task to be completed by hand.[3] The evidence supports the jury's conclusion that Santa Fe failed to provide reasonably safe appliances for Roth and his co-workers on May 2, 1990 and May 8, 1990. Santa Fe knew or should have known that Roth could be harmed by manually lifting and moving the crossing planks. Nevertheless, it chose to supply Roth and his co-workers with hand tools; tools that were inadequate (unsafe) to complete the assigned task, despite the fact that safer means were readily available.

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3. For example, when a work crew is unable to obtain "track and time" to complete a project (which would allow them to place a truck boom or other mechanical lifting device on the tracks), in an emergency situation they may be required to remove crossing planks by hand.

[13] With respect to ground (c), the record is replete with evidence to support a jury finding that Santa Fe failed in its duty to provide reasonably safe methods or work. As we concluded in our discussion or ground (a) and (b), *supra*, requiring trackmen to manually lift and move crossing planks unreasonably subjects them to risks of back injury. In addition, the jury heard evidence of alternative methods or removing crossing planks. Roth testified that during his first week of work in the Augusta, Kansas area, while working under Foreman John Bright, he removed crossing planks using a truck boom and a speed swing. the record also reveals some mechanical lifting device, whether a truck boom, speed swing, or backhoe was available for use on both May 2, 1990 and May 8, 1990. Furthermore, even though the considerably easier and safer mechanical method of lifting was readily accessible, Foreman Rosebraugh (on May 2, 1990) and Foreman Fox (on May 8, 1990) ordered their work crews, including Roth, to remove crossing planks by hand. "The question of alternative methods are facts to be considered by the jury in determining whether . . . the method used by [Santa Fe] was reasonably safe and whether . . .other methods could have been easily adopted." *Welsh v. Burlington N. R.R.*, 719 S.W.2d 793, 796 (Mo.App.1986). Based on the evidence and all reasonable inferences the jury was permitted to draw therefrom, it was not unreasonable for the jury to find Santa Fe failed to provide Roth with reasonably safe methods or work. Ground (d) is an allegation of negligence pertaining solely to the May 8, 1990 incident. Roth alleged Santa Fe failed to provide reasonably adequate help to perform the task of lifting and moving crossing planks. Again reviewing the evidence in the light most favorable to the verdict and disregarding all contrary evidence, we find the evidence sufficient to support a jury finding that Santa Fe failed to provide Roth with adequate help on May 8, 1990. Roth testified the safe removal of crossing planks requires four people. One person with tie tongs must lift up the crossing plank. Another wedges a lining bar beneath the center of the crossing plank to enable the plank to be rolled out from under the rail. And finally, while the first two are holding and centering the crossing plank, two other people roll the crossing plank out from under the rail. The evidence was uncontroverted that on May 8, 1990, Roth was assisted by only two crew members, trackman Bill Hart and an unnamed truck driver. Clearly, the jury had evidence before them

that Roth's crew was shorthanded. Furthermore, considering the risks associated with manually removing crossing planks, it was reasonable for the jury to conclude Santa Fe was negligent for failing to provide Roth with adequate help. *Keith v. Burlington N. R.R.*, 889 S.W.2d 911 (Mo.App.1994), presents a similar situation. A railroad employee (Marshel Keith) was injured while stacking railroad ties that were being removed from a bridge. Keith introduced evidence that the safe practice required two men to stack the ties. However, the day Keith was injured, the railroad had not replaced a man who as on vacation which left Keith working by himself. Keith submitted the railroad failed to provide reasonably adequate help, and the jury rendered a verdict in his favor. On appeal, the court found the evidence sufficient to support the jury's verdict. As in *Keith*, we too find sufficient evidence to support a jury finding that Santa Fe failed to provide Roth with reasonably adequate help.

[14-17] Santa Fe's second subpoint alleges the trial court erred in denying its motion for j.n.o.v. because Roth failed to adduce expert medical evidence causally connecting the May 8, 1990 incident with his back injury. Roth's "burden of establishing causal connection is met when there is evidence, even though entirely circumstantial, from which the jury may with reason make the inference that [Santa Fe's] negligence contributed in *any* way to [Roth's] injury." *Hertzler*, 720 S.W.2d at 768 (emphasis added). Clearly, causation in an FELA case differs significantly from a "normal" negligence case. Under the FELA, if Santa Fe's negligence is the *slightest* cause of Roth's injury, liability is established. *Ewing v. St. Louis S.W. Ry.*, 772 S.W.2d 774, 776 (Mo.App.1989) (citing *Rogers*, 352 U.S. at 506-07, 77 S.Ct. at 448-49). In addition, "because this is a FELA suit, fact questions, to the maximum extent proper, shall be left to the jury." *Mateer v. Union Pac. Sys.*, 873 S.W.2d 239, 241 (Mo.App.1993) (citing *Rogers*, 352 U.S. at 509, 77 S.Ct. at 450). Finally, we must bear in mind our treatment of the FELA causation issue in *Foltz v. Burlington N. R.R.*, 689 S.W.2d 710 (Mo.App.1985). In *Foltz*, we relied on *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959), and quoted the Supreme Court:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the

> failure of any medical witness to testify that is was in fact the cause . . . the matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration. Though this case involves a medical issue, it is no exception to the admonition that, "it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." (Footnotes and citations omitted).

Foltz, 689 W.W.2d at 717 (quoting Sentilles, 361 U.S. at 109-10, 80 S.Ct. at 175-76).

With these standards in mind, our review of the record reveals the following evidence. Roth called Dr. Richard Wendt, an orthopedic surgeon as his expert medical witness. Roth had visited Dr. Wendt in July 1990 by referral from his family physician. Dr. Wendt took a medical history from Roth which included information that Roth was a trackman for the railroad; he built and maintained railroad track; his job required heavy lifting, sometimes up to 250 pounds; and while doing heavy lifting in early May of 1990, he injured his back which caused low back pain and left leg radiation that became progressively worse. Based on his examination and subsequent treatment of Roth, Dr. Wendt diagnosed Roth's back condition as a herniated disk.[4] At trial, Dr. Wendt testified repetitive bending, stooping, and heavy lifting activities are a cause of a ruptured or herniated disk. He also testified to a reasonable degree of medical certainty that the incidents of lifting in early May of 1990 were compatible with Roth's herniated disk. Dr. Wendt clarified his medical opinion and further

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4. Technically, the diagnosis was a "herniated nucleus pulposus" - a herniation at the left L4 lumbar spine.

testified Roth suffered a progressive injury resulting from his pattern of heavy lifting; "what he was doing [heavy lifting] . . . did cause a herniated disk." From this evidence and all reasonable inferences able to be drawn therefrom, the jury could reasonably conclude that Santa Fe's negligence on May 8, 1990 did in some way cause, whether in whole or in part, Roth's injuries. As a result, the trial court did not err in denying Santa Fe's motion for j.n.o.v. This first point is denied.

As its second point, Santa Fe alleges the trial court erred in giving Roth's verdict directing instructions (submitting the four grounds of negligence discussed, *supra*) because they were not fully supported by the evidence. Specifically, Santa Fe contends Roth failed to adduce any evidence of the following: 1) Santa Fe failed to provide reasonably safe appliances for Roth to manually remove crossing planks on May 2, 1990; 2) Santa Fe failed to provide reasonably safe appliances or reasonably adequate help for Roth to perform "spiking work" on May 8, 1990.[5] this point is without merit as we have already determined there was an evidentiary basis for the jury's conclusion.

For its third point, Santa Fe contends the trial court committed error by submitting Instruction Nos. 8. 9, 10, 12, 13, 14 and verdict forms A and B because such instructions violated the due process, equal protection, and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the Missouri Constitution. Santa Fe further alleges the trial court erred in refusing its tendered instructions CC, DD, EE, FF, GG, HH, II, and JJ. Santa Fe complains, in particular, that the instructions did not allow the jury to record findings as to percentages of fault between the parties as in all other Missouri comparative fault cases, and as a result, Santa Fe is denied meaningful appellate review.

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5. Santa Fe misconstrued Roth's petition and the evidence at trial and has limited its argument to Roth's "spiking" activities (driving spikes to secure rails) on the afternoon of May 8, 1990. However, the Petition alleges, and the evidence established, that Roth was initially injured on that date while manually removing crossing planks, although he did not report the injury until later in the day at a time when he was driving spikes. Santa Fe completely disregards this evidence in its argument.

[18] Essentially Santa Fe challenges the substance of the instructions for FELA cases as set forth in MAI. At the outset, we acknowledge strict adherence to MAI instruction forms and "Notes on Use" is required by our Supreme Court and recall its admonition that "[i]f this court is to make this system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that the pattern instructions be used as written." Davis V. *St. Louis S.W. R.R.*, 444 S.W.2d 485, 489 (Mo.1969). As such, extended discussion of this issue is unwarranted. First, Santa Fe disputes the propriety of giving Instruction Nos. 8 and 12 (Roth's verdict directors) based on MAI 24.01 and denying tendered instructions EE and FF.[6] In addition, Santa Fe objects to the submission of Instruction Nos. 10 and 14 (Roth's damage instructions) based on MAI 8.02 and rejecting tendered instructions II and JJ.[7] Our supreme court in *Bair v. St. Louis-Sand Francisco Ry.*, 647 S.W.2d 507 (Mo. banc 1983), clearly disposes of Santa Fe's attack on these instructions. In *Bair*, the court held the submission of MAI 8.02 was "mandatory to the exclusion of all others under the MAI," and "[t]he submission of MAI 24.01 was proper, and in fact required under Supreme Court Rule No. 70.02(b)." *Id.* at 510-11. As for Santa Fe's remaining allegations of instruction error, we note that Instruction Nos. 9 and 13 (affirmative defense-contributory negligence) and Verdict Forms A and B are applicable to Roth's FELA action and were drafted in strict compliance with MAI. "If a Missouri Approved Instruction is applicable, such instruction must be given to the exclusion of all others." *Gilliam v. Chicago & N.W. Transp. Co.*, 859 S.W.2d 155, 161-62 (Mo.App.1993) (citation omitted); Rule 70.02(b). As a result, the trial court did not err in rejecting Santa Fe's tendered instructions CC, DD (verdict forms), GG, and HH (affirmative defense-contributory negligence).

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6. Santa Fe's tendered instructions EE and FF proposed to add the phrase, "in your Verdict A [and B, respectively] you must assess a percentage of fault to defendant," at the beginning of the instruction.

7. Santa Fe proposed additions to the submitted instructions that directed the jury to identify a percentage of fault for both parties and state Roth's total amount of damages, leaving the judge to compute Roth's final recovery.

[19] Finally, as Santa Fe acknowledges in its brief, "this court[] has limited authority to ignore approved instructions in Missouri." On this issue, Santa Fe is correct. As stated, *supra*, we are bound to follow our Supreme Court's directions. The instructions submitted by the trial court have been approved by the Missouri Supreme Court and are mandatory. We have no authority to alter this point of law. Therefore, Santa Fe's remaining allegation that its constitutional rights were violated is merely colorable, not substantial, and we need not address it. Santa Fe's final point is denied.

The judgment is affirmed.

All concur.

CLERK OF THE SUPREME COURT

STATE OF MISSOURI

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65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

January 23, 1996

Mr. Jeffrey P. Ray
2345 Grand Boulevard, Suite 2500
Kansas City, Missouri 64108-2684

In re: John D. Roth, Jr. vs. The Atchison, Topeka and Santa Fe Railway Company
Western District No. 50194
Supreme Court No. 78568

Dear Mr. Ray:

This is to advise that the Court this day entered an order in the above-entitled cause, a copy of which is attached herewith.

Very truly yours,
Thomas F. Simon

Clerk

Attachment
cc: David L. Blunt and John H. Leskera

B 2

In the Supreme Court of Missouri

No. 78568
W.D. No. 50194

January Session, 1996

John D. Roth, Jr., Respondent
vs. (TRANSFER)
The Atchison, Topeka, and
Santa Fe Railway Company, Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

Price, J., not participating.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1996, and on the 23rd day of January, 1996, in the above-entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 23rd day
of January, 1996

(Thomas F. Simon) Clerk

_____ D.C.

8.02 [1991 Revision] Damages—F.E.L.A.—Injury to Employee

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained [and is reasonably certain to sustain in the future][1] as a result of the occurrence[2] mentioned in the evidence. Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.]

36.01 FORMS OF VERDICT

36.01 [1980 Revision] Form of Verdict—Plaintiff vs. Defendant—Personal Injuries Only

VERDICT _____ [1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff (*state the name*) for personal injuries [2] against defendant (*state the name*), we, the undersigned jurors, find in favor of:

_____

(Plaintiff (state the name)) or (Defendant (state the name))

Note: Complete the following paragraph only if the above finding is in favor of plaintiff (*state the name*).

We, the undersigned jurors, assess the damages of plaintiff (*state the name*) at $_____ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

37.03 [1986 New] Comparative Fault—Damages

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence. You must state such total amount of plaintiff's damages in your verdict.

In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

37.07 COMPARATIVE FAULT

37.07 [1986 New] Comparative Fault—Form of Verdict—Plaintiff vs. Defendant

VERDICT _____[1]

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff (*state the name*) for personal injury,[2] we, the undersigned jurors, assess percentages of fault as follows:

Defendant[3]	(*state the name*)	_____%	(zero to 100%)
Plaintiff	(*state the name*)	_____%	(zero to 100%)
	TOTAL	_____%	(zero OR 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $_____ (*stating the amount*).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must sign below.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

95-1705

No.

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Petitioner,

VS.

JOHN D. ROTH, JR.,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals for the Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a state court that modifies its verdict form to comply with the FELA violate any constitutional rights of the parties?

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JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257(a). Respondent objects to jurisdiction under this statute. The verdict form that Petitioner challenges is not a "statute" of Missouri and hence no jurisdiction is afforded under 28 U.S.C. § 1257(a). The Missouri Approved Instructions, which contain the verdict form at issue, are used pursuant to an April 9, 1991 order of the Missouri Supreme Court. (See A.1) Furthermore, the "validity" of the FELA is not drawn into question and, as such, the provisions of 28 U.S.C. § 1257(a) do not authorize the jurisdiction of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 1257(a)

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

45 U.S.C. § 53

> The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL ARGUMENT WAS WAIVED.

Petitioner maintains that the trial court's instructions and verdict form violate the equal protection, due process and supremacy clauses of the United States Constitution. At trial, however, Santa Fe made no specific constitutional challenge to the instructions and verdict form. The failure to set forth facts demonstrating a violation of a specific constitutional provision bars a party from raising a constitutional challenge on appeal. *Gilliam v. Chicago & NorthWestern Transp. Co.*, 859 S.W. 2d 155, 162 (Mo. App. 1993). In *State ex rel. Spralding v. Borduarnt*, 501 S.W.2d 527, 530 (Mo. App. 1973), the Missouri Supreme Court held:

> [I]t is not sufficient that certain sections of the Constitution be set out and the assertion made that rights thereunder have been violated but the facts which constituted such violation must be set out.

Santa Fe failed to properly raise a constitutional issue to the trial court. A mere allegation that an instruction is unconstitutional is insufficient to preserve the issue for review. In *Gilliam*, supra, at page 162, the court stated:

> [T]he challenge did not meet the requirement that the facts which constituted a violation of C&NW's constitutional rights be set out. All that was stated was the bare conclusion that the failure to require the jury to state the percentage of fault which it assessed against Gilliam on the verdict form violated its constitutional rights. There was no attempt to state facts which demonstrated how this failure deprived C&NW of due process of law. C&NW has failed to properly raise a constitutional question, and therefore, no

issue is presented for review on that question. *Callier v. Director of Revenue*, 780 S.W.2d 639, 641[3] (Mo. banc 1989).

Petitioner made only the request that the trial court declare the present MAI scheme to be unconstitutional. Petitioner made no reference to either the Missouri or U.S. Constitution. In fact, Santa Fe's attorneys never uttered the phrases equal protection, due process, or supremacy clause. Furthermore, Santa Fe's attorneys made no factual argument to support its "unconstitutional" argument. Therefore, this Court should not consider Petitioner's argument as it has not been properly raised.

II.

THE FORM OF INSTRUCTIONS AND VERDICTS IN AN FELA CASE ARE PROCEDURAL MATTERS GOVERNED BY STATE LAW.

This Court has established that the measure of damages in an FELA case is an issue of "substance" determined by federal law. *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 410, 411 (1985). As such, it has been held that the question whether a present value instruction should be given is a federal question. *Id.* at 411. Likewise, this Court has also determined that the question whether a present value instruction in an FELA case must be given is a matter governed by federal law. *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490, 493 (1980).

However, matters as to the form of instructions and verdicts are procedural matters that are governed by state law. The Petitioner relies upon Justice Frankfurter's opinion in *Dice v. Akron, Canton, & Youngstown R. Co.*, 342 U.S. 359, 364-365 (1952) cited in its Petition. That opinion, however, provides that a state court hearing an FELA case is free to use its own "form in which the law is administered." *Id.* at 365. Furthermore,

Mondou v. New York, New Haven & Hartford RR. Co., 223 U.S. 1 (1912), another case cited by Petitioner, demonstrates that Congress, in enacting the FELA, did not attempt to "control or affect" state court "modes of procedure." *Id.* at 57. It is certain, therefore, that the form of instructions and verdicts are procedural and governed by state law.

It must be noted that Petitioner admits that the appropriate federal law required under FELA was given to the jury in the instructions and verdict form submitted by the trial court. Petitioner was entitled to and received a contributory negligence instruction. Also, the jury was instructed that its award "must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." (A.2-3) As such, Petitioner acknowledges that the *correct* substantive federal law was submitted to the jury!

Petitioner argues that the trial court's instructions and verdict form denied it meaningful appellate review. However, Petitioner has no federal right to appellate review of a damage award in an FELA case. Creation of such a federal right would wreck havoc on every state's jury instructions. For example, Missouri, like many other states, does not itemize damages on its verdict forms. Petitioner has no federal right to review, for appeal, each specific element of the jury's damage award such as past wage loss, future wage loss, past pain and suffering, future pain and suffering and all other elements of damages. To adopt Petitioner's argument would essentially require use of federally mandated jury instructions in an FELA case. The FELA and past decisions of this Court clearly do not require use of specific instructions.

Petitioner also argues that it is impossible to determine whether the jury's verdct in this case may have been $76 million with 99% fault attributable to the plaintiff. This argument represents nothing more than wild speculation. The jury awarded damages of $760,000 based on the two back injuries the plaintiff sustained

on May 2, 1990 and May 8, 1990. As a result of these injuries and the back surgery that followed, plaintiff was not physically capable of returning to his railroad employment. At trial plaintiff called John Orson Ward, Chairman of the Department of Economics of the University of Missouri, as an expert witness. Dr. Ward testified that the plaintiff's economic wage loss for past and future earnings was $747,012 after reducing future earnings to present cash value and using after tax figures. As such, plaintiff's damage award was very close to the total economic loss.

III.

MISSOURI'S FELA VERDICT FORM IS MODIFIED FROM THE STATE NEGLIGENCE VERDICT FORM TO COMPLY WITH THE FELA, NOT DISCRIMINATE AGAINST FELA LITIGANTS.

Missouri Approved Instruction 8.02, entitled "Damages — F.E.L.A. — to Employee" is given in FELA cases where contributory negligence is submitted. MAI 8.02 provides:

> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction Number _____, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.

This instruction was given by the trial court in this case (A.2-3). The Committee Comment to MAI 8.02 explains the basis for its departure from Missouri's general negligence verdict form. The Comment states:

> The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. § 53, the jury diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines total damages and plaintiff's percentage of fault but the judge makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

The distinction is further articulated by Missouri Appellate decisions. For example, in *Gilliam v. Chicago & NorthWestern Transportation Co.*, 859 S.W. 2d at 155, 161-162 (Mo. App. 1993), the court stated:

> C & NW next contends the court erred in giving Gilliam's verdict form because the form failed to require the jury to find a specific percentage of fault on the part of Gilliam. C & NW contends that the instructions based on comparative fault should have been given rather than instructions based on FELA. The form about which C & NW complains is MAI 8.02. The committee comment following that instruction states that the submission of comparative fault in a FELA case differs from the submission of comparative fault in cases based on Missouri law. The committee points out that under 45 U.S.C. § 53, the jury diminishes damage in proportion to the employee's negligence. On the other hand, in comparative fault under Missouri law, the jury determines total damages and the plaintiff's percentage of fault but the judge diminishes the total damages by the percentage of fault found on the part of the plaintiff. Here, the verdict form was in compliance with MAI 8.02.

Therefore, Missouri's verdict form is modified only to comply with 45 U.S.C. § 53 which provides that the jury, not the judge, reduces the damages by the percentage of fault attributable to the plaintiff. The verdict form is not intended to discriminate against FELA litigants.

CONCLUSION

Respondent prays that the Court deny the Petition for a Writ of Certiorori.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI

en banc

April 9, 1991

ORDER

The forms of Jury Instructions, Notes on Use, and Committee's Comments, as finally submitted to the Court by the Committee on Jury Instructions as set forth on pages 1 through 647 of the attached volume entitled Missouri Approved Jury Instructions, [MAI], Fourth Edition, published by West Publishing Company, St. Paul, Minnesota, copyright 1991, are approved and hereby adopted by the Court.

The aforesaid forms must be used on and after January 1, 1992, and may be used prior without such use being presumed to be error.

Those Instructions, Notes on Use, and Committee's Comments that are designated as "Committee Proposed" are neither approved nor disapproved by the Court, and neither the use of nor the failure to use these instructions shall be presumed to be error.

Day — to — Day

Charles B. Blackmar
Chief Justice

INSTRUCTION NO. 10

If you find in favor of plaintiff on his claim of injury on May 2, 1990, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the accident of May 2, 1990. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction No. 9, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [1991 Revision]; MAI 32.07 [1978 Revision] — Notes on Use (1978 Revision), Note 2

First, second and fourth sentences submitted by plaintiff; third sentence submitted by defendant The Atchison, Topeka and Santa Fe Railway Company

INSTRUCTION NO. 14

If you find in favor of plaintiff on his claim of injury on May 2, 1990, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the accident of May 2, 1990. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction No. 13, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [1991 Revision]; MAI 32.07 [1978 Revision] — Notes on Use (1978 Revision), Note 2

First, second and fourth sentences submitted by plaintiff; third sentence submitted by defendant The Atchison, Topeka and Santa Fe Railway Company